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reason, as the section then stood—so he thought to improve upon the idea by shortening the period to five days, entirely forgetting that under the new scheme which he had evolved there was no occasion for making a return to the clerk's office at all—or certainly no such occasion until the motion was ready for the docket—that is, after fifteen days service.

Our conclusion, therefore, offered with some diffidence, is, that *motions under sec. 3211* (as amended by Acts 1895–6, p. 140), *mature after fifteen days notice, whether the notice be served before or during the term at which the motion is to be heard—provided the notice be returned to the clerk's office five days after service. After compliance with these requirements with reference to service and return, the motion is docketed, though the term have already commenced before the maturity of the notice.*

If this view be correct, the proceeding is assimilated to motions on official bonds, under secs. 3209 and 3210, save that here but ten days' notice is prescribed.

This bungling legislation is but another illustration of the truth to which the REGISTER has frequently given expression, that the Code-tinkerer is apt to leave larger breaches than those he attempts to heal. W. M. L.

THE PRESENT STATE OF THE LAW.*

Our law is fragmentary. It is like the broken mirror of Richard II.; and day by day it is broken into still smaller pieces. It is for the most part a vast and heterogeneous collection of individual instances. Since the time that Coke made his accurate survey of English law the great books of the common law have never been adequately posted up. Since that time, now more than 250 years, entries have only been made in journals, blotters, day books, in loose memoranda on detached sheets; and by almost any one that desired to write on the subject. When we want to know how any particular account stands, we refer to all manner of writers and judges as experts, who disagree after the manner of experts. The courts are perpetually in conflict. If Charles V. could not succeed in making a few clocks keep time together, it would be sheer madness to expect that a hundred or so of courts whose reports are printed could be kept in accord. On almost every question they are found to vary; and they are generally as divergent as Samson's foxes.

We have had various labor saving devices, Leading Cases, Selected Cases, American Decisions, American Reports, and so on. Then we have annual volumes on certain topics of the law, legitimate successors

* Part of the Annual Address delivered before the Virginia State Bar Association, July 16, 1896, by Hon. U. M. Rose, of Arkansas.

of the annual Keepsakes, Tokens, and Books of Beauty, issued by Lady Blessington and others in the first half of this century. Then we have digests and text-books on all subjects without number. But these we can hardly use in court; for while one section or one page may be favorable to our views, the next will be hostile; so that, whatever we may use in the seclusion of our chambers, what we require in the court-room is the uncontradicted, the immaculate, the austere, the uncriticised original report.

Where there is such a conflict among the authorities uniform results are not to be expected. A judge may decide almost any question any way, and still be supported by an array of cases; and his decision will at last probably be the result of temperament or of prepossession. It is one of the maxims of our law that that law is the best that leaves the least discretion to the judge. But in the existing conflict of authorities a judge can hardly decide anything without exercising his discretion. A choice between antagonizing cases involves a large discretion. I apprehend that if by some photographic process we could get a visible outline of our nebular system of law, it would appear very much in the shape of the chancellor's foot. The mere fact that every judge attempts to express his conception of the law in his own language must of itself be productive of endless controversy.

Our text-books are for the most part collections of multitudinous head notes, which are no more than compressed tablets of the law, warranted to keep in all climates, convenient for administration to all the courts; but as no two of them are alike, and as they are liable to interact upon and to neutralize each other, their effect on the judical economy is only a matter of conjecture. The glorious uncertainty of the law which was some time a proverb has become a truism.

A man's library is often a fair index to his character. Coke's library consisted of folios, not many in number; for in those days there were only twelve volumes of reports, of which nine were year books. Besides these he had the statutes of the realm, and various abridgements. His library, though exhaustive, was not large. We may suppose that a single shelf might hold all the books of a law library of that time.

Nothing is more in contrast with the age of Elizabeth than the modern deluge of books. There are now added to the National Library in Paris about 60,000 volumes a year, making about 6,000,000 volumes in the course of a century, even if there should be no increase from year to year. In various other public libraries the number of

annual additions is perhaps no less. Of this 60,000, it is quite impossible that more than 500 volumes can have any reasonable or even tolerable excuse for being. When we look at the books and pamphlets that litter our book stalls, for the most part mere sweepings of vacant chambers, it seems a pity that most of them shall be handed down to a remote posterity like the mummied cats of Egypt. If things go on in this way for a thousand years it is hard to see how such vast collections as must accumulate can be housed and cared for. As books continue to breed like rabbits in Australia, the time may come when it may be a thing to mention in one's epitaph as commending him to all ages that he never wrote a book, and when the man that utterly extirpates a book will receive more honor than one who has written a hundred; but before that time comes it would be a public boon if the Malthusian doctrine for the restriction of population could be applied to the production of books. It seems a pity that the tribunal composed of the barber and the curate that disposed of the library of Don Quixote could not have been perpetuated with an immense increase of jurisdiction. But no books increase faster than our law reports. It is deplorable that there cannot be some kind of central clearing house, where reported cases may cancel each other, leaving us some net and intelligible result. If things go on at the present rate, the time must soon come when any new Omar will be hailed as a deliverer and as a public benefactor.

Years ago they had a law in Sweden that possessed some excellent features. Whoever wrote a foolish or an evil book was condemned to eat it under penalty of death. He thus appeared in the character of Saturn devouring his own children. By a humane provision the author was allowed to serve up his book with such ingredients as might render it most palatable. Theodore Reinking, having written a stupid book in Latin on political subjects, was condemned under this law in 1644. It is said that he cooked his book up into some kind of a sauce, in which form it no doubt acquired a piquancy that it had not before possessed. The punishment was presumably effectual, as there is no evidence that he appeared again as an author, probably having lost his taste for books. Such a law would not only lessen the number of books, but it would promote brevity and simplicity of style; for if a man were in danger of having literally to eat his own words, it may be supposed that he would not use any more than were necessary, and that he would avoid sesquipedalian words, any one of which would suffice for a hearty meal; while the rigid enforcement of such a law

would tend greatly to promote the improvement of the culinary art, to say nothing of the accurate knowledge that would be acquired as to the effect of different kinds of literary diet on the digestive organs.

A year or so ago I read what seemed to me to be a very sensible report by one of your committees on the subject of the avalanche of law books that daily issues from the teeming press. Soon afterwards I saw a notice of this report in a publisher's circular, in which the publisher said that if lawyers did not want new books, the remedy was easy; they need not buy them. It was very kind of him to say so; and what he said was true; but it was not the whole truth. Collectively we could refuse to buy such books, individually we cannot. We are like the armed powers of Europe. Each and all would be benefited by a general disarmament, but neither can disarm unless all the rest will do so. As nearly all of our law stands on the shifting sands of individual cases, and as every new case, like every new child that is born, is fraught with unknown possibilities, self-preservation requires that we shall keep up with the disorderly and rapidly moving procession as well as we can; and, as we cannot remember one case out of a hundred, even if we had time to read them all, we have to buy digests and text-books without number, good, bad and indifferent, to serve as convenient indexes. If we fail to act thus dire will be our fate. . . . . Thus it is that we have to buy all the latest books, if for nothing else in order to defend ourselves against the bad law that is constantly being exploded on the profession. To a traveller from Cathay it might well seem that the legal profession is organized and maintained solely in the interest of booksellers.

To the really thoughtful mind the expedient of a strike must sometimes have suggested itself. If we were only organized, and had a master lawyer, who could tell us how and when to strike, and if we could manage to evade Federal injunctions, we might march on the principal publishing centers, and, firing their immense magazines of unsold law books, we might feel one moment of delirious joy to see the landscape illuminated by what Coke called "the gladsome light of jurisprudence."

Or, if we preferred milder measures, we might issue an ultimatum, saying: "We do not want any more of your books. If the law is a science at all, anything capable of human comprehension, we have more books now on that subject than there are on all other scientific subjects put together, leaving out, of course, all those that are wholly obsolete on either side. Mind cannot master them, the memory

cannot retain them. Extremes meet, and too much law is the same as no law. By dint of endless repetitions counsel is darkened, by reason of multitudinous illustrations the rule is lost sight of."

In arguing the case of *Jones v. Randall*, Cowp. 38, before Lord Mansfield, Mr. Dunning said: "The laws of this country are clear, evident and certain; all the judges know the laws, and, knowing them, administer them with uprightness and integrity."

Mr. Dunning certainly displayed a keen sense of humor; but Mansfield, true to his Scotch origin, answered seriously, saying: "As to the certainty of the law mentioned by Mr. Dunning, it would be hard upon the profession if the law was so certain that everybody knew it; the misfortune is that it is so uncertain that it costs much money to know what it is, even in the last resort."

The rule, correctly stated, is that all men are presumed to know the law except the judges of the courts. They are not presumed to know it; and hence they cannot be held responsible for any official conduct based on ignorance or misconception of the law. The courts, which are only the judges idealized, are, however, presumed to know the law; a presumption that can be safely indulged, since it involves no personal liability; a mere complimentary fiction, as most lawyers know, like the presumption that all men are innocent.

None of us pretend to know the law; or, if we know it at all, it is in a very general way, something like the manner in which we know our native country, by maps, by boundaries, by great mountain ranges, and by a few landscapes, being ignorant of the most of the multitudinous details. When asked a question about the law, whether written or unwritten, we answer with a modesty and distrust not innate, but which is the fruit of many surprises and disappointments. We never could have known much of such a boundless subject; and much that we may have known has been forgotten.

Mr. Livingston, in his report on the penal code of Louisiana, said: "Is it not mockery to refer me to the common law of England? Where am I to find it? Who is to interpret it for me? If I should apply to a lawyer for a book that contained it, he would smile at my ignorance, and, pointing to about five hundred volumes on his shelves, would tell me that these contained a small part of it; that the rest was either unwritten, or might be found in London or New York, or was shut up in the breasts of the judges at Westminster Hall."

At present an American lawyer, pointing to shelves containing at least five thousand volumes, would say that no one knows, or pretends,

or hopes ever to know the law. Were Coke alive now he would not pretend to know all the unwritten law. Such stupendous knowledge was never vouchsafed to mortals. We are soon to have a digest that is to contain references to nearly five hundred thousand American cases, overflowing, like the floods of Egypt, through all the letters of the alphabet.

Our statutes are for the most part as fragmentary as the unwritten law. Drawn up often by some rural member who is trying his prentice hand on legislation, and who would not hesitate to change the orbits of the planets if he had a chance, mutilated in the legislative mill, thundering in the preface with preposterous titles and irrelevant preambles, contused, riddled and broken by discordant and conflicting amendments, dislocated and distorted by impossible provisos, they inspire us with a sense of dismay; so that after perusing them repeatedly we are fain to confess that they are like the "idle tears," and that we "know not what they mean." Or if the statute is more carefully drawn, and by a more competent hand, it will generally be found to be a mere stone or log thrown in for the purpose of checking or diverting some current of judge-made law, with the unexpected result of overflowing remote gardens and plantations of which the author of the statute had never a thought.

The time was when it was supposed to be a reproach to call one a case lawyer; but now we are all either case lawyers, or are not lawyers at all. Cases are our counters, and there are no coins. Our legal arguments are for the most part a mere casino-like matching and unmatching of cases, involving little or no intellectual effort. The law is ceasing to be a question of principles, and is becoming a mere question of patterns. Often we have to snatch the cases from the vast mouldering heap in haste. Some of them may have been overruled, others may be moribund; some may be like *Thorogood v. Bryan*, overruled by the court that made them, or like *Dumpor's case*, repealed by act of Parliament, but still having a posthumous existence in some of our States. We do not know how the matter may stand; but we walk out on the unsteady footing of these cases to the extreme limit, and marshal the court the way it should go. The judge may be learned; but he may know no more of these particular cases than we do. The familiar sound of *Brown v. Jones* may awaken some far-off memory like the reminiscences of childhood; and on the faith of that case he may decide the question one way or the other, only to find out afterwards that he was in error, as the case that he recalled was another case between the same inveterate litigants. . . . . .

The trial of each case in our courts brings with it a retrial of many former cases; and each lawyer engaged in court sets up his own mental alembic in order to distil the law of the cases cited by him from the concrete facts in which it is embodied; a task requiring time, patience and discrimination, but which must often be accomplished with a degree of haste which renders anything like accuracy impossible. In many instances we simply call over our rosary of cases, pitting against one decision by Chief Justice Marshall ten later ones rendered by Mr. Justice Shallow, without any attempt at discrimination as to facts, partly because lack of time forbids that necessary process.

With proper relays of books there is no reason why under our system a legal argument should not go on forever, provided the principal actors could be rendered immortal, and could be made proof against exhaustion. As the matter stands, after the incumbent of the bench has been pelted with cases of every degree of relevancy and irrelevancy for some hours, during the latter part of which time, being now thoroughly hypnotized, he has been engaged in a vain effort to find out what the universe was made for, he finally recovers sufficient animation to pass on the question, "so ably and exhaustively discussed at the bar," as he is pleased to remark, deciding, perhaps, as charitable people are wont to do, in favor of the most importunate beggar, who is generally the worst of the lot. For no truer thing has been uttered than was spoken by Judge Dillon, who says:

"When the judges resort, as they frequently do, to *analogies* supposed to be furnished by previous cases for the rule of decision to apply to the case in hand, it must often be extremely uncertain in advance what the result will be; and it is frequently doubtful whether, fettered in this way, they reach as sound results as if governed by general considerations of what is right and just."*

I have made no special estimate; but I think I can not be far wrong in supposing that there are in this country to-day in common use at least ten times as many law books as there were forty years ago; and during the last twenty years the progressive increase in the number of such books has been greatly in excess of all previous calculations. A short chapter, in Blackstone's Commentaries, on Corporations, is now expanded into the *magnum opus* of Judge Thompson on that subject, consisting of six volumes of more than a thousand pages each, of which a proper index, as the publishers inform us, would require a volume of from four hundred to eight hundred pages.

* Law and Jurisprudence of England and America, p. 272, n.

The most of the new cases that are reported are in principle mere repetitions of former cases; and as such they are not only useless, but detrimental. More than two hundred years ago the Statute of Frauds of Charles II. was enacted. It seemed to be simple enough, comprising only a few sections; but the last work on the subject of this statute is a bulky volume, containing reference to thousands of cases. It must be plain that if, with all of these adjudications we do not understand the statute, then we never can do so. Indeed, the statute is so stuck all over with cases, just as the hull of a ship is sometimes stuck all over with barnacles, that we hardly ever see it; and whenever we consult that branch of the law we lose ourselves among the glosses that have been put upon it. In short our legal science tends rapidly to a mere strife of words not unlike that in which scholastic learning finally broke up and disappeared.

Of course one may be an advocate of codification without approving of many wild optimistic theories that have emanated from its most enthusiastic partisans. If Bentham seems to belong to that class, it must be remembered that when he took up arms against the existing state of the law, English jurisprudence was burdened and disgraced by many absurdities which have since disappeared under an influence which Bentham was the first to inspire into the public mind. It must also be conceded that the excessive zeal of reformers is sometimes beneficial in redressing the balance that is ruled by an equally unreasonable conservatism.

A medium course would no doubt be safest. A few judicious additions to our Statute of Frauds, for instance, might condense and give definite expression to whole volumes of case law. Recently the commercial law of England has been enacted as a statute consisting of a hundred sections, reducing the volume of the law on that subject, as was estimated by the author of the statute, to about one five thousandth part of its former bulk. In this country the reduction by the same process would hardly be less than one fifty thousandth part.

The statute referred to seems to have given very great satisfaction in England; but some such work is much more needed here than there, both on account of the greater number of our law books, and on account of an anomaly that exists nowhere else. Ever since the decision in *Swift v. Tyson* it has been held by the Federal courts that they are not bound to follow the decisions of the State courts of last resort in respect of questions of general commercial law. Thus it often happens that a State court and a Federal court sitting side by side will pur-

posely decide cases on a like state of facts differently. This gives to the complaining party in many instances not only a choice of forums, but also a choice of results—an evil which ought not to exist, an evil which would not exist if the law on this subject were reduced to the form of a statute, either State or Federal. Perhaps if Congress could be induced to pass an interstate and international commercial code, all the States would soon adopt it; and this would certainly be a great improvement on our present chaotic methods. There are other branches of the law that, like commercial law, naturally lend themselves to codification; and prudence would suggest that they should first receive attention, the process being gradually extended to other topics.

In England the constitution is unwritten. It is nothing but a collection of customs more or less vague. There is a notion that in order to be respected it must be concealed, or wrapped in mystery like the veiled prophet. No one knows what it is, and any one can claim for it whatever he likes. We in America assume that we occupy in this regard a much more enlightened position. Our organic law is all written, so that anyone can read it that pleases. It is more important than all other laws put together. It sums up all the guaranties of rights of property, of life and of liberty, precious heir-looms acquired after ages of deadly strife and warfare, sealed with the blood of a long line of patriots and brave men. While we do not question the necessity of expressing the fundamental law relating to these vital principles in terse and deliberate language through the organ of conventions composed chiefly of laymen, we scruple to undertake the perilous task of reducing to peremptory and plain written words the law relating to bills of exchange and promissory notes.

"The frightful accumulation of case-law," said Sir Henry Maine, "conveys to English jurisprudence a menace of revolution far more serious than any popular murmurs, and which, if it does nothing else, is giving to mere tenacity of memory a disgraceful advantage over all the finer qualities of the legal intellect."

In this country of course the case is far worse. Compared with that of the American lawyer, with his prodigious collection of cases, the condition of the Chinese printer with his hundred thousand separate blocks with which to set up the printed page, is enviable.

Reviled or contemned, whoever favors a rational law reform may possess his soul in peace. The stars in their course fight for him. Sooner or later the present system must break down under its own weight. Every new case that is decided, every new digest or text-

book that is issued, but hastens the day when the great Pontine marsh of case law shall be drained.

When Napoleon at St. Helena looked back over the past, he said: "My code is the sheet anchor that will save France, and will entitle me to the benediction of posterity."

His genius and energy had sufficed to compress the evolution of centuries into less than a lifetime; and now, when his scepter had turned to ashes, when all his conquests had been wrenched away, and he was a lonely prisoner far from the scenes of his triumphs, something told him that beyond his victories on the field of battle, more enduring than towering arch, or stately column, or marble sepulchre, would be a work of peace to which he had given only a part of four months of his time, a work unstained with blood, unpolluted with crime.

Perhaps I cannot better close what I had to say this evening on a topic that requires much more ample and profound consideration than I have been able to give it, than by quoting the language of a modern writer:

"A petty State, having little to boast of, may well keep its laws, or what are called its laws, hidden in obscurity; but a great country loses half its dignity and strength when it cannot in an orderly and methodical way give some account to all whom it may concern of the main reasons why its social progress and the contentment of its citizens have been so well assured."*

*1 Paterson, Lib. Subject, 175.